Nos. 746 and 747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. L. MECHLING BARGE LINES INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE NEW YORK
CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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REPLY TO INTERSTATE COMMERCE COMMISSION'S MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF CASES

FEDERAL STATUTES CITED

OTHER AUTHORITIES

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The United States by the Department of Justice has filed a Memorandum in this proceeding, setting forth a number of questions presented by the appeal deserving

plenary consideration by this Court,[1] and, on pages 16 and 17, pointing out deficiencies in findings of the Commission order which by themselves would require setting the order aside.

Having been unable to convince its statutory legal representative that a motion to affirm should be filed in this proceeding, the Interstate Commerce Commission, uninvited and untimely, has filed a motion to affirm.[2]

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[1] We quote:

"This Memorandum is submitted in response to the Court's request that the United States comment upon the Jurisdictional Statements filed by the appellants. For the reasons indicated below, we believe that the questions presented by the appeals warrant plenary consideration." * * * (Our emphasis.) Memorandum For The United States (hereinafter "U.S. Mem.") p. 1.

[2] Contrary to the statement in footnote 1 on page 2 of the Commission's motion, the Clerk's letter of April 15 was addressed only to the Solicitor General and included no request to the Commission.

Similar liberty with the facts is taken in the first full paragraph on page 2 of the Commission's motion, where the Commission implies that appellants' action in court against the temporary order improperly entered without findings or hearing in this proceeding by the Commission (which was dismissed "for want of jurisdiction"—but compare Mechling v. United States, 368 U.S. 324 (1961)) was in some way a substitute for the subsequent full hearing in this proceeding that appellants had sought and been promised by the Commission.

Similarly in footnote 5 (p. 4) the Commission says that after the 6¢ rate went into effect farmers received much more for their corn, citing a discussion in the Commission's report of a completely hypothetical exhibit which did not purport to reflect any actual experience, and which purported to show the possibility of an increase of 8.75¢ per bushel in the rail bids. The Commission's special counsel here undertakes to stake a claim to have increased farmer income 8.5¢ a bushel, in contrast to the Commission's equally groundless claim that the river bids still were higher than the increased rail bids! Even if the New York Central had reduced the rail rate to nothing, however, and General Foods has passed on the entire reduction in higher bids to farmers, that would not justify the New York Central's charge of a non-compensatory rate.

Much of the Interstate Commerce Commission's motion has already been answered by the Solicitor General's Memorandum and by the jurisdictional statements and replies heretofore filed. A few points, however, deserve further attention:

(1) Neither the Solicitor General nor the Interstate Commerce Commission refers to the protest before the Commission and in the court below against the separately published inbound rate to Kankakee on the ground that it does not comply with the requirements of Section 1 (5) of the Interstate Commerce Act (49 U.S.C. § 1 (5)). The Commission ignored the point in its order on the ground that the inbound rate had no independent existence, thereby contradicting prior decisions that each separately published rate must by itself meet the requirements of the Act. (*Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 279 U. S. 768, 776 (1929); *City of Sheboygan* v. *C. & N. W. Ry.*, 215 I.C.C. 65, 70 (1936); *Phoenix Utility Company* v. *Southern Ry.*, 173 I.C.C. 500, 501-2 (1931); *Basing Rates on Paving Brick from Jacksonville to Florida Points*, 100 I.C.C. 390 (1925); *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917).) The court below refused to consider this point on the ground that it was not pertinent in a Section 4 proceeding, treating the question basically the same as the question whether the Commissioner was bound to consider violations of Sections 3 (1) and 3 (4) by the rate promulgated in deciding whether or not to grant relief from the prohibition of the 4th Section. This point, too, merits at least plenary consideration by this Court. We think it merits summary vacation of the order, and especially when considered with the language of Section 4 itself.

(2) The Commission insists again that the requirement of a compensatory rate in Section 4's proviso limiting the Commission's approval of departure rates is applicable

only to the overall rate rather than only to the competitive rate "to or from the more distant point." It bases its contention on the proposition that Section 4 is intended to prevent carriers from engaging in discriminatory practices giving long-haul shippers rate advantages over competing short-haul intermediate shippers (I.C.C., p. 22). This purpose was undoubtedly a principal reason for the original enactment of Section 4 and its amendments through 1910. This purpose was served, however, by the changes in Section 4 made by the Mann-Elkins Act of 1910.[3]

The changes in the Interstate Commerce Act made in the Transportation Act of 1920,[4] of which the language in question was a part, were largely made for the protection of competing carriers, and principally competing water carries. The Commission was barred from granting the railroads relief from the prohibitions of the fourth section for *any* non-compensatory charge to or from the more distant point. Potential water competition could not constitute a "special case" justifying grant of relief. In Section 15 the Commission was for the first time empowered to fix minimum rates, a power intended to protect competing water carriers from the pressure of below-cost rate competition by the railroads, as was made clear in the committee reports.

The House Committee Report on the bill said:

> "With this power the Commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service by establishing a minimum below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its

[3] 36 Stat. 544, 547.
[4] 41 Stat. 474, 480, 484.

water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off, the rail rates would be restored and would rise to even higher levels."

House Report No. 456, 66th Cong. 1st Sess. p. 19.

Stating the purpose of the 1920 amendments on the floor of the House, the Chairman of the Committee, Congressman Esch, pointed out the common purpose of the new minimum rate rule and the amendments of Section 4 by the same act:

"We give [the Commission] the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was not better off and was, in fact, worse off than before."

58 Cong. Rec. 8317.

Nothing in *Proportional Rates to Gulf Ports for Export*, 44 I.C.C. 543 (1917) cited by the Commission on page 23, indicates that the Commission was then *approving* separately published non-compensatory competitive rail rates, either proportional or local, even though it lacked power to forbid them, or that Congress intended in enacting the Transportation Act of 1920 that such rates should be approved.

There is *no* reason to believe that Congress intended anything other than what it plainly said for the first time by the Transportation Act of 1920, *viz.*, that "the Commission shall not permit the establishment of *any* charge to or from the more distant point that is not reasonably compensatory for the service performed." There is every reason to believe that Congress intended exactly what it said, and that non-compensatory rates from the more distant or competitive point, such as the 6¢ rate here involved, are not to be permitted by the Commission.

Since the "minimum rate rule" was introduced by the Transportation Act of 1920, it is held that any railroads proposing to publish new rates, as these railroads were, must show them to be reasonably compensatory in order to meet the requirement *of Section 1 (5)* that the rates shall be "reasonable";[5] and the Commission holds that this applies severally, to each factor of a multiple factor through rate.[6] Otherwise a deliberately non-compensatory charge, separately published as a competitive factor, is easily subsidized by another, non-competitive factor of the whole through rate, and thereby the stated Congressional intention of the authors of the 1920 amendments to protect the water carriers from cut-rate rail competition would easily be defeated.

Among other things these appellants protested against the grant of the authorization applied for as a violation of Section 1 (5) under this accepted interpretation, and the Commission refused to pass on the question as not being germane to the railroads' request for authorization, a view that disregarded the Commission's settled doctrine that it

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[5] Chicago & Eastern Illinois R. Co. v. United States, 107 F. Supp. 118, 123 (S.D., Ind., 1952), aff'm'd, 344 U.S. 917.

[6] City of Sheboygan v. Chicago & North Western Ry. Co., 215 I.C.C. 65, 70 (1936).

will not exercise its power to authorize any new rate departing from Section 4 that does not appear to be lawful under the Act, without regard to which particular section or provision may condemn it.

Moreover, the above-quoted statement by the Chairman of the House Committee, expressly relating the minimum rate rule to Section 4, and the statement of Senator Townsend respecting the new language of Section 4 (M.J.S. pp. 14-15) make it plain that the minimum rate rule of these amendments, enforced as part of Section 1 (5), and the 4th Section, as amended by the same Act to add the language we rely on (which forbids *any* non-compensatory rail charge from the more distant point) were addressed to the same mischief. This mischief was not over-charges against shippers, but the harm done to water carriers and eventually to the country when railroads employ that oldest of all monopoly devices, the making of selective, below-cost charges where they have water competition, subsidized by charges and revenue on non-competitive business that the railroads will continue to have in any event.

It is impossible to read the statements of Congressman Esch, *supra,* and Senator Townsend without realizing the purpose of these 1920 amendments to protect water carriers against such selective rate-cutting by railroads. Very obviously that purpose is defeated if the railroads can subsidize their competitive, below-cost, inbound charges with their non-competitive, outbound revenue *and the new language of the 1920 amendment of Section 4 is apt to prevent that.* It would be difficult to reject the plain and literal effect of that new language as an unintended accident.

Again this point at least deserves plenary consideration if it is not, as we think, sufficiently clear to warrant summary vacation of the Commission's order.

(3) In its motion the Commission has some difficulty in straddling two horses while discussing discrimination against the City of Chicago. On the one hand it half-heartedly urges that there is no such discrimination and that it so found (I.C.C. pp. 15-17). On the other hand it argues at somewhat greater length that the Commission need not consider this point (I.C.C. pp. 17-21).

The "findings" cited by the Commission are sketchy and give no indication that it was trying to decide whether the rate was in fact usable via Chicago, *i. e.*, in trade on the Chicago Board of Trade.[1] Rather these sentences were afterthoughts expressed following the Commission's dismissal of the Board of Trade's position in this clause: "these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." (M.J.S., App. C, p. 451)

The Commission's discussion of the necessity for considerating violations of Section 3 by rates in issue in Section 4 proceedings adds nothing to that already before the court in the previously filed documents in this proceeding. The Justice Department's Memorandum recognizes the "strong argument" based on the Commission's duty to enforce all provisions of the Act "that sound administrative practice requires the Commission to consider whether Section 3 has been violated so that a proposed rate which violates the policy of the statute may be stricken down at the earliest opportunity." (U.S.Mem. p. 13)

The Justice Department's Memorandum also recognizes the entrapment of appellants by the Commission's sudden

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[1] The District Court, of course, ignored these "findings". Cf. M.J.S. App. A, p. 4a.

departure from its policy enunciated in repeated prior announcements and the consequent issue of unfair administrative procedure as a substantial issue.

Similarly the violation of Section 3(4) is urged by the Commission to be extraneous to a Section 4 proceeding (I.C.C. pp. 20-21). But the Justice Department includes the question as one deserving of plenary consideration (U.S.Mem. p. 12).

(4) Finally the Commission has urged (Commission Motion, pp. 23-24) that its findings show an increase in the New York Central's revenues, citing the *Transcontinental Cases of 1922*, 74 I.C.C. 48. The Justice Department has aptly shown deficiencies in these findings (U.S. Mem. pp. 15-17) even as to the New York Central alone. The findings further omit altogether consideration of the effect upon the revenues of other railroads (as a group or individually) which were parties to the application (cf. the *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, 77-81) or the necessity for continuing the discrimination against Chicago, in order to make the Commission's deficient argument. (Cf. Mechling Reply to Motions to Affirm, pp. 6-7.)

Again the omission to make adequate findings on an essential point is sufficient to require summarily setting aside the Commission order. (Cases cited, M.J.S. p. 18)

CONCLUSION.

From the foregoing it is apparent that the questions raised by these appeals at least deserve plenary consideration by this Court, and would justify summary vacation of the Commission's order.

Respectfully submitted,

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Dated: June 1, 1963.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

DATED at Chicago, Illinois the ..... day of June, 1963.

.....

EDWARD B. HAYES